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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 938

MONOLITH PORTLAND CEMENT CO., *Petitioner*,

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, LOS ANGELES DISTRICT, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Rules involved	2
Statement	3
Reasons for granting the writ	9
Conclusion	18

Appendix A—Mandate of this Court 1a
B—Opinion below 2a
C—Judgment below 10a

CITATIONS

CASES:

Communist Party of the United States v. *Subversive Activities Control Board*, 254 F.2d 314 .....15, 16, 17
Dragon Cement Co. v. *United States*, 244 F.2d 513, cert. den. 355 U.S. 833 .....3, 4, 5, 6
General Talking Pictures Corp. v. *Western Electric Co.*, 304 U.S. 175 13
Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 10
Helis v. *Ward*, 308 U.S. 365 13
House v. *Mayo*, 324 U.S. 42 14
Irvine v. *California*, 347 U.S. 128 13
Langnes v. *Green*, 282 U.S. 531 13
Monolith Portland Cement Co. v. *United States*, 168 F. Supp. 692, aff'd. 269 F.2d 629 .....3, 4, 5, 6
Namet v. *United States*, 373 U.S. 179 .....13, 14, 17
Riddell v. *Monolith Portland Cement Co.*, 301 F.2d 488, reversed and remanded, 371 U.S. 537, reh. den. 372 U.S. 832 6

Page

United States v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76 4, 5, 6, 8, 10, 11
United States v. *Carignan*, 342 U.S. 36 13
United States v. *Merry Brothers Brick & Tile Co.*, 242 F.2d 708, cert. den. 355 U.S. 824 5

STATUTES:

Act of September 14, 1960, 74 Stat. 1010, 1018 ..... 5, 7

Internal Revenue Code of 1939 (26 U.S.C., 1952 Ed.)
Section 114(b)(4)(B) 6, 10

MISCELLANEOUS:

H.R. Rep. 939, 87th Cong., 1st Sess. 5

Revised Rules of the Supreme Court, 28 U.S.C.A.
Rule 23 .....2, 9, 12
Rule 24 13

S. Rep. 903, 87th Cong., 1st Sess. 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Monolith Portland Cement Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on August 22, 1964 (R. 866).

OPINIONS BELOW

The District Court issued no opinion; its findings of fact, conclusions of law and judgment dismissing petitioner's complaint for refund of income taxes paid (R. 828-31) are unreported. The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix B hereto, *infra,* p. 2a, is reported at 336 F. 2d 402.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1964 (R. 866; App. C, *infra*, p. 10a). A petition for rehearing and rehearing en banc was denied without opinion on October 1, 1964 (R. 867). By order of Mr. Justice White, entered on December 17, 1964, the time for filing a petition for a writ of certiorari was extended to February 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Are questions which are present in a case, but which are neither presented for review in a petition for certiorari, nor fairly comprised therein, automatically foreclosed from consideration by the lower courts on remand of the case by this Court under a mandate providing "for further proceedings" in conformity with this Court's per curiam opinion?

RULES INVOLVED

The principal rule involved is Rule 23 of this Court's Revised Rules, 28 U.S.C.A., which provides in pertinent part:

> "Rule 23. The petition for certiorari.
>
> "1. The petition for writ of certiorari shall contain in the order here indicated—
>
> * * * *
>
> "(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

STATEMENT

The question presented by this petition is purely procedural in nature. It involves only the proper interpretation of this Court's mandate. However, in order to understand fully the context in which the question arises, it is necessary that the background facts be set forth.

In 1951, petitioner mined limestone from its own quarry and manufactured it into cement. After computing its percentage depletion allowance for Federal income tax purposes by using the kiln-feed stage as its depletion base, petitioner filed a claim for refund of income taxes paid, and. after the denial of its claim, commenced a refund action in which it contended that since its type of limestone was not salable in crude form, finished cement was its first "commercially marketable mineral product" under the applicable statute and hence its proper depletion base. The District Court agreed, *Monolith Portland Cement Co.* v. *United States,* 168 F. Supp. 692 (S D. Cal. 1958), and the Ninth Circuit affirmed, 269 F. 2d 629.

For the taxable year 1952, petitioner followed the same procedure as it had in 1951 and upon denial of its claim for refund brought the instant action, claiming that the doctrines of res judicata and collateral estoppel required a holding in its favor for the taxable year 1952, and that even in the absence of res judicata or collateral estoppel it was, under a proper interpretation of the applicable statute, entitled to use finished cement as its depletion base.[1]

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[1] As authority, petitioner cited *Dragon Cement Co.* v. *United States*, 244 F. 2d 512 (1st Cir. 1957), cert. den. 355 U.S. 833, and the first *Monolith* case, *supra.*

The District Court ruled that res judicata and collateral estoppel foreclosed the relitigation of certain questions of fact pivotal to the Government's defense. But preferring not to rest on those grounds alone, the District Court also decided the question of statutory construction, and again ruled in petitioner's favor.

While the Government's appeal was pending, this Court decided *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960), involving the proper depletion base for fire clay and shale. This Court there held that since substantial amounts of raw fire clay and shale were actually and customarily sold in Cannelton's local market, the crude mineral products themselves constituted Cannelton's proper depletion base.

But this Court there expressly distinguished certain Courts of Appeals decisions that had allowed a finished product depletion base where it had been found, as in the *Dragon Cement* and first *Monolith* cases, that the product of the mines involved was not salable in the form of a crude mineral product. (364 U.S. 76, 89.)[2]

For several years prior to the decision in *Cannelton*, the Administration had asked Congress to "revise the law" allowing a cement depletion base for non-salable

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[2] While this Court's opinion does not expressly list all of the Courts of Appeals decisions that it considered distinguishable, it is clear from the language used, as well as from the briefs filed, that the *Dragon Cement* case was among those cases that this Court deemed distinguishable. (See Brief for Respondent, *United States* v. *Cannelton Sewer Pipe Co.*, *supra*, pp. 42 et seq.) The first *Monolith* case, while not cited in Cannelton's brief, followed the decision in *Dragon Cement* and is clearly a part of the same line of cases.

cement-type limestone,[3] but no action was taken. Then, following the *Cannelton* decision, Congress in the Act of September 14, 1960 enacted legislation providing for a mandatory kiln-feed (rather than crude mineral product) depletion base for post-1960 years, and requiring cement producers to make an irrevocable election by November 1960 between a kiln-feed base and "existing law" for all open prior tax years.

Relying upon the *Dragon Cement* and first *Monolith* cases and this Court's refusal in *Cannelton* to disapprove such cases as being declarative of "existing law," as well as upon the District Court's res judicata and collateral estoppel findings in the instant case, petitioner elected an "existing law" depletion base for its 1952-1960 tax years, and continued the instant action for a refund of taxes based upon the difference between a kiln-feed depletion base and a cement depletion base.

It was in this context that the instant case first reached the Court of Appeals for the Ninth Circuit. That Court, after noting that this Court in *Cannelton* had treated the cement cases as "distinguishable," affirmed the District Court's holding that petitioner was entitled to a cement depletion base for 1952.

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[3] Following this Court's denial of certiorari in the *Dragon Cement* case, *supra*, cert. den. 355 U.S. 833, and the 13 cases consolidated as *United States* v. *Merry Brothers Brick & Tile Company, et al.*, 242 F. 2d 708, cert. den. 355 U.S. 824, two budget messages to Congress as well as the testimony of the Secretary of the Treasury referred to the asserted need to "revise the law" allowing a cement depletion base. See S. Rep. 903, 87th Cong., 1st Sess. pp. 4-5 (1961); H. Rep. 939, 87th Cong., 1st Sess. pp. 4-5 (1961).

(*Riddell* v. *Monolith Portland Cement Co.*, 301 F. 2d 488.) The Court of Appeals further indicated that since petitioner, in making its statutory election and in shaping its tax and financial affairs, had in good faith relied upon cases such as the *Dragon Cement* and first *Monolith* cases as constituting "existing law" approving a cement depletion base, a different rule should not now be applied retroactively to its detriment. (301 F. 2d 488, 497.) Finally, the Court of Appeals indicated that although it "might well agree" with the District Court's finding that res judicata and collateral estoppel also barred consideration of the Government's contentions, it preferred to decide the case "on the merits," that is, simply on a construction of § 114(b)(4)(B) as applied to cement manufacturers generally. (301 F. 2d 488, 498.)

The Government then petitioned this Court for certiorari. It chose to limit its "Question Presented" to a single question of statutory construction, as follows:

> "Whether, for the purpose of computing the percentage depletion allowance on limestone, 'mining' as defined in Section 114(b)(4)(B) of the Internal Revenue Code of 1939, includes the processes employed by an integrated miner-manufacturer to manufacture cement". (Govt. Pet. Cert. p. 2).

Notwithstanding that other issues had appealed to the courts below as possible alternative bases for a decision in petitioner's favor, the Government did not ask this Court to consider any of those issues. Indeed,

its only reference to any other such issues was in a footnote.[4]

In the body of its petition the Government addressed itself only to the statutory construction question, and contended primarily that the Ninth Circuit had erred in failing to hold that the principles of the *Cannelton* case applied generally to cement producers. It requested that this Court reverse the judgment below and remand the case for disposition in accordance with *Cannelton*. Petitioner's brief in opposition presented several reasons why the Government's petition should be denied.

This Court granted the Government's petition, and, without hearing argument, issued a short per curiam

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[4] The Government's footnote read as follows:

> "There have been two other issues in the case. The 'marble' issue raised by the Government in the trial court as an additional defense, is not raised in this petition. A collateral estoppel issue was raised by the taxpayer in relation to both of the other issues, but both courts below preferred to rest their decisions on the merits. (R. 169-170; App. A, *infra*, p. 39.) In view of this Court's subsequent decision in *Cannelton*, collateral estoppel clearly does not apply to the issue presented on this petition. See *Commissioner* v. *Sunnen*, 333 U.S. 591." (Govt. Pet. Cert. p. 3, n. 2.)

As can be seen, there was no mention of any kind of the Court of Appeals' statement, made *after* the *Cannelton* decision, that it "might well agree" that collateral estoppel *was* applicable. (301 F. 2d 488, 498.) Nor did the Government make any mention whatsoever of the "prospective only" and "existing law" issues, *i.e.*, petitioner's arguments in the court below that the theory of the *Cannelton* case should not be applied retroactively to the detriment of cement manufacturers generally, particularly in light of Congressional understanding of "existing law" at the time of enactment of the Act of September 14, 1960, arguments with which the Court of Appeals had also intimated agreement. (301 F. 2d 488, 497.)

opinion which answered the statutory construction question in the Government's favor on the authority of *Cannelton,* thus reversing the decision of the Court of Appeals. (371 U.S. 537.) However, there was not a single word in this Court's per curiam opinion which dealt with any other issue in the case. Petitioner filed a petition for rehearing, seeking assurance that the case would be remanded for further proceedings. Although the petition was denied (372 U.S. 832), this Court remanded the case to the District Court under a mandate calling "for further proceedings in conformity with the opinion of this Court." (R. 773; App. A, *infra,* p. 1a.)

Following the remand, no hearing of any kind was ever held in the District Court. Instead, by minute order made and entered without prior notice, the District Court ordered this Court's mandate spread upon the record (R. 746), called for new findings, conclusions and judgment (R. 746), considered proposed findings in chambers, rejected those proposed by petitioner (R. 803), vacated all prior findings (R. 828), adopted new findings and conclusions on the statutory construction point only (R. 828-831), and entered the Government's suggested judgment of dismissal of petitioner's complaint (R. 831), *all without a hearing.*

Petitioner appealed, urging that, since this Court's opinion was authority only for the single question of statutory construction actually presented to it for consideration and decision, petitioner was entitled to a hearing and decision on the remaining issues and questions which, *notwithstanding this Court's decision,* were still present in the case. Petitioner asserted that dismissal of its complaint without a hearing and decision on such questions was plainly a misconstruction

of this Court's opinion and mandate under this Court's own rules and decisions and was grossly unfair. The Court of Appeals, however, affirmed the District Court's dismissal of petitioner's complaint, concluding that this Court had itself considered and "rejected" *every* argument on which petitioner sought to be heard below. (336 F. 2d 402; App. B, *infra*, p. 2a.)

REASONS FOR GRANTING THE WRIT

In grossly misconstruing this Court's prior mandate by affirming the District Court's dismissal of petitioner's complaint, without affording petitioner a hearing and decision on the remaining issues in the case, the action of the Court of Appeals involves a clear disregard of this Court's certiorari practice, is in conflict with this Court's own rules and decisions, as well as with a decision of the Court of Appeals for the District of Columbia Circuit, and constitutes clear error requiring the invocation of this Court's supervisory power over the actions of lower federal courts.

Rule 23 of this Court's Revised Rules sets forth the rules governing the filing of a petition for certiorari. Paragraph 1(c) of Rule 23 states that the petition for certiorari shall contain, among other things—

> "The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. *Only the questions set forth in the petition or fairly comprised therein will be considered by the court.*" (Rules of Supreme Court, 28 U.S.C.A.) (Emphasis supplied.)

In its petition for certiorari in the prior proceeding in this Court, the Government elected to limit its

"Question Presented" to a single question of statutory construction, framed as follows:

> "Whether, for the purpose of computing the percentage depletion allowance on limestone, 'mining,' as defined in Section 114(b)(4)(B) of the Internal Revenue Code of 1939, includes the processes employed by an integrated miner-manufacturer to manufacture cement." (Govt. Pet. Cert. p. 2.)

No other question was presented for consideration. This Court answered the single question thus presented by ruling in its per curiam opinion that § 114(b)(4)(B) is to be construed to limit petitioner's depletion base to its constructive income from crushed limestone, rather than from finished cement. (371 U.S. 537, 539.) *No other question was decided,* and the case was remanded to the District Court under a mandate calling "for further proceedings in conformity with the opinion of this Court." (R. 773; App. A, *infra,* p. 1a.) It was thus plainly contemplated that further proceedings would be held.

On remand, and in accordance with this Court's mandate, therefore, petitioner clearly was entitled to a hearing and decision on the remaining issues in its case —*issues that were neither subsidiary to the single question of statutory construction which had been presented to this Court, nor "fairly comprised therein."* As has been indicated, the remaining issues on which petitioner sought a hearing and decision included the question whether, under the circumstances here present, a decision as significant and far-reaching as this Court's decision in the *Cannelton Sewer Pipe* case should be applied prospectively only with respect to cement manufacturers (cf. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358), and the

question whether res judicata and collateral estoppel should apply to this case, notwithstanding this Court's *Cannelton* decision.

As can be seen, the foregoing issues are wholly non-statutory in nature, and go entirely to the question whether, *notwithstanding this Court's interpretation of the applicable statutory provision,* this taxpayer might nevertheless be entitled to a favorable decision on other grounds. *Neither of these issues was presented to this Court for consideration by the Government in its petition for certiorari.* Indeed, as has been shown, the Government ignored completely petitioner's arguments on the "prospective-only" and "existing law" points, and disclaimed the existence of the "collateral estoppel" issue in a footnote in which it expressed the view that collateral estoppel "clearly does not apply," even though the Court of Appeals had previously indicated, after the *Cannelton* decision, that it "might well agree" with petitioner that collateral estoppel *does* apply.

Since both lower courts had previously chosen to rest their decisions primarily on a favorable interpretation of the applicable statute, although recognizing merit in petitioner's remaining arguments, it was not until *after* this Court's per curiam summary reversal on the statutory construction point that the remaining issues assumed real significance. Yet, it was at this very point that both lower courts refused to hear and decide these issues.

As has been shown, the District Court vacated all of its prior findings and conclusions, and issued new findings and conclusions on the statutory construction point only. It then entered judgment dismissing petitioner's action.

On appeal, the Ninth Circuit affirmed the District Court's action on utterly untenable grounds. Without citing any authority whatsoever, the Court of Appeals asserted that this Court previously had before it a "case or controversy" which included each and every issue in the case. Though it acknowledged that *only* the statutory construction issue had actually been presented to this Court in the Government's petition for certiorari, the Ninth Circuit nevertheless noted that the other issues in the case had been called to this Court's attention in petitioner's brief in opposition to the Government's petition, and again in petitioner's petition for rehearing. The Court of Appeals then concluded that, in light of the foregoing, the other issues in the case somehow had been considered and "rejected" by this Court, and thus were foreclosed from further consideration on remand. The Ninth Circuit's affirmance of the District Court's action thus rested, not on an evaluation of the merits of the other issues in the case, but on the indefensible ground that this Court had "rejected" all issues in the case—*including issues which had not even been presented to it for consideration as required by Rule 23.*

The basis for the Court of Appeals' decision is so glaringly erroneous as to require little comment. This Court's certiorari practice is not geared to the abstract concept of a "case or controversy." Rule 23 plainly and unmistakably provides that, "Only the questions set forth in the petition or fairly comprised therein will be considered by the Court." The *only* question set forth in the Government's petition for certiorari was a question of statutory construction, and under Rule 23 *only* that question could properly have been decided.

This Court has consistently declared that its certiorari review is strictly limited to the "questions presented" in the petition. As was stated in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 179:

> "One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue. *Crown Cork & Seal Co.* v. *Gutmann Co., ante,* p. 159. Petitioner is not here entitled to decision on any question other than those formally presented by its petition for the writ."

See also, *Helis* v. *Ward,* 308 U.S. 365, 370; *Irvine* v. *California,* 347 U.S. 128, 129.

Moreover, as this Court recently held in *Namet* v. *United States,* 373 U.S. 179, where an issue is brought to this Court's attention in papers filed in reply to a petition for certiorari, "under our rules it is not before us." (373 U.S. 179, 190.) The reason for this is clear. The function of a brief in opposition to a petition for certiorari is, under Rule 24 of this Court's rules, merely to disclose "any matter or ground why the cause should not be reviewed by this Court." (Supreme Court Rule 24.1, 28 U.S.C.A.) A brief in opposition, therefore, cannot of itself place additional issues before this Court for consideration on their merits.

That is not to say that this Court lacks the power, in cases where it deems it appropriate, to *affirm* a judgment below on the basis of issues other than that presented in the petition, which have been called to its attention by the respondent. (See, for example, *Langnes* v. *Green,* 282 U.S. 531; *United States* v. *Carignan,* 342 U.S. 36.) But those cases afford no basis whatever for assuming, as the Court of Appeals here

assumed, that matters mentioned in a brief in opposition *must have been considered and rejected* by this Court when it summarily *reverses and remands* a decision that had been based on *only one of several possible grounds.* And there is *no case* that affords any basis whatever for the assumption indulged in by the Court of Appeals, where, as here, the opinion of this Court was clearly confined to answering the single question presented in the petition and contained no reference of any kind to the other matters mentioned in the brief in opposition, and where, as here, there is no indication of any kind that such other matters had even been recognized by the Court, much less considered and decided. Had this Court intended to consider and decide any issue other than that presented by the Government, it surely would have said so.

Accordingly, since this Court's rules clearly set forth the limited function of a brief in opposition, and since the *Namet* case, *supra,* squarely holds, with respect to an issue raised in reply to a petition for certiorari, that "under our rules it is not before us," the Ninth Circuit's conclusion that this Court must have "rejected" the remaining issues in the case merely because they had been mentioned in the brief in opposition is not only completely lacking in authority, but is in direct conflict with this Court's own rules and decisions.

Further, the Ninth Circuit's reliance upon this Court's denial of petitioner's petition for rehearing merely serves to compound its basic error. Since this Court has long admonished that the denial of a petition for certiorari "imports no expression of opinion upon the merits of a case" (*House* v. *Mayo,* 324 U.S. 42, 48), it is true *a fortiori* that the denial of a petition

for rehearing "imports no expression of opinion upon the merits" of issues which were never properly before this Court. As a matter of fact, the petition for rehearing did not even seek a decision by this Court on the other issues; it merely sought to have it made clear that on remand those issues not passed upon by this Court would be open for decision below. And this Court's mandate so provided.

Finally, in holding that on remand the remaining issues in the case were not open for hearing and decision, the Court of Appeals placed itself in direct conflict with the Court of Appeals for the District of Columbia Circuit. In *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F.2d 314 (D.C. Cir. 1958), that Court of Appeals, in an opinion by Judge Prettyman, [redacted] held that this Court's reversal and remand of a case which presented only certain issues for review does not foreclose consideration of other issues in the case upon remand. Rather, the Court held, on remand the lower courts *must* reconsider all remaining issues in the case. As the Court stated:

> "Rule 23(c) of the Rules of the Supreme Court, 28 U.S.C.A., provides for a statement of the questions presented for review. It provides that the statement of a question will be deemed to include every subsidiary question 'fairly comprised therein' and that only such questions will be considered by the Court. But that seems to us not to be a basis for concluding that all questions not stated or 'fairly comprised' in a statement are abandoned. To be sure, if a judgment is affirmed by the Supreme Court, all questions presented and all which might have been presented are *res judicata. But, if the judgment is reversed or va-*

> *cated on a single point (e.g., a constitutional question and the only point presented to the Court), other claims of error are not foreclosed upon a retrial or reconsideration upon a general remand.*" (254 F.2d 314, 321.) (Emphasis supplied.)

The Court went ahead to explain the significance of a remand "for further proceedings"—the precise language of this Court's mandate in the instant case—as follows:

> "Of course, if the Supreme Court reverses and directs that a certain final judgment be entered, the whole controversy is ended. *We are here considering a reversal or vacation with a remand, as, for example, 'for further proceedings in accordance with this opinion.' Such a remand, or a general unqualified remand, means that the appellate court and trial court are to reconsider the case on all other points.* Those points remain open after the Supreme Court's disposition of the case before it. * * * *If this were not so, almost every petition to the Supreme Court would be burdened with a plethora of 'questions presented' in which the Court has no interest and should have none.*" (254 F.2d 314, 321-322.) (Emphasis supplied.)

Significantly, in the *Communist Party* case it was the petitioner in this Court who, although victorious here, sought and obtained further consideration of certain remaining issues on remand. If a petitioner can pick and choose the questions to be presented for review by this Court without losing its right to be heard on other issues on remand, it seems clear beyond doubt that a *respondent* in this Court has not lost *its* right to be heard on the remaining issues in a case where this Court has ruled for the petitioner solely on the single question presented by the petition and has remanded the case "for further proceedings." Accordingly, in denying petitioner a hearing and decision on

the remaining issues in the instant case, the decision below is in direct conflict with the holding of the District of Columbia Circuit in the *Communist Party* case.

Whatever the reasons behind the Government's action in here asking this Court to consider *only* the statutory construction question, the effect of that action necessarily was *to leave the remaining issues in the case for further consideration on remand.* It is absolutely essential that this be the rule. Otherwise, lower courts could deny a respondent a hearing on remand merely by assuming that a reversal by this Court *must* have involved a decision on every point mentioned by the respondent, even though this Court's opinion does not so indicate, and even though the *Namet* case and this Court's own rules provide otherwise. No lower court should be permitted so cavalierly to deprive a respondent of its right to a hearing on the remaining issues in a case.

However this Court might have decided the remaining issues in the case had it chosen to consider them, the fact is it did not. Yet, if the decision below is permitted to stand, its effect will be to require this Court, in order to prevent the unconscionable result described above, to state specifically in each case what has heretofore been considered obvious—that this Court did not in fact decide issues which under its own rules it was not required to consider, and which were not even mentioned in its opinion.

Whether or not petitioner might prevail on the remaining issues in the lower courts is not here a matter of proper concern. Indeed, inasmuch as petitioner here claims only the right to obtain a hearing and decision on those issues, it would be grossly improper for either party to consume the time of this Court debating their

merits at this stage of the proceedings. All petitioner seeks is the invocation of this Court's supervisory power to correct the unjustified and unsupportable action of the court below in ignoring this Court's own mandate, rules and decisions, as well as the decision of the Court of Appeals for the District of Columbia Circuit, and in thus departing from the accepted and usual course of judicial proceedings.

CONCLUSION

For the reasons stated, and since no hearing would appear to be necessary, this petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded to the District Court for further proceedings which would permit a full consideration of the remaining issues in the case.

Respectfully submitted,

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